

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LACY M. FERDINAND

Claimant

V.

BIMBO BAKERIES USA, INC.

Respondent

AND

INDEMNITY INSURANCE

Insurance Carrier

Docket No. 1,074,348

ORDER

Respondent and its insurance carrier (respondent) requested review of the October 7, 2015, Order by Special Administrative Law Judge (SALJ) Jerry Shelor. This is a proceeding for penalties. The case has been placed on the summary docket for disposition without oral argument.

APPEARANCES

Jan L. Fisher of Topeka, Kansas, appeared for the claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Order.

ISSUES

The SALJ found respondent did not follow proper procedure and instead chose to unilaterally end claimant's temporary total disability (TTD) benefits without considering whether any of the conditions allowing the discontinuance of TTD benefits were met. The SALJ ordered penalties in the amount of \$100 for each week TTD benefits remain unpaid and past due since August 19, 2015.

Respondent argues the authorized treating physician found claimant's accident was not the prevailing factor in causing her injury, rendering claimant's accident

noncompensable. Respondent maintains it is not required to provide benefits to a worker who has suffered no compensable injury, and the SALJ exceeded his jurisdiction in ordering respondent to do so.

Claimant contends it is inappropriate for respondent to make a change in benefits without following the procedural requirements of K.S.A. 44-534 and K.S.A. 44-534a.

The sole issue for the Board's review is: did the SALJ exceed his jurisdiction in ordering penalties in this matter?

FINDINGS OF FACT

ALJ Brad Avery signed an Agreed Order entered into by the parties on July 31, 2015, which stated:

1. For purposes of this Agreed Order, Respondent admits that [claimant] met with personal injury on or about June 9, 2015 in Shawnee County at or near Topeka, Kansas;
2. Respondent designates Eden Wheeler, M.D. as the authorized treating physician to provide treatment for the effects of this injury; and
3. Respondent will pay [TTD] benefits at the rate of \$503.53 per week from June 10, 2015 until such time as Claimant is 1) released to return to regular employment; 2) released to return to employment with restrictions that the employer will accommodate; or 3) certified as having reached maximum medical improvement.¹

A 20-day demand letter dated August 3, 2015, was sent to respondent via certified mail requesting payment of 7.71 weeks of TTD benefits in the amount of \$3,882.22. Respondent issued a payment of \$4,028.24 in TTD benefits for the time period of June 11, 2015, through August 5, 2015.

Respondent scheduled an appointment for claimant to see Dr. Wheeler on August 19, 2015. Although the Order indicated this appointment was for treatment, Dr. Wheeler provided an independent medical evaluation, which included causation and prevailing factor opinions as requested by respondent.² Dr. Wheeler determined claimant's work activities were not the prevailing factor in causing her injury and advised further treatment

¹ ALJ Order (July 31, 2015) at 1.

² See M.H. Trans., Cl. Exs. 1 & 2.

be through claimant's primary care provider. Dr. Wheeler did not include opinions regarding claimant's work status or possible restrictions.

After receiving Dr. Wheeler's report, respondent terminated claimant's medical treatment and TTD benefits on August 19, 2015. Respondent did not file a motion to terminate or demand to change benefits with the Division prior to terminating benefits.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-512a(a) provides:

In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

K.S.A. 2014 Supp. 44-534a(a)(1) states, in part:

After an application for a hearing has been filed pursuant to K.S.A. 44-534, and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total or temporary partial disability compensation.

K.S.A. 2014 Supp. 44-534a(b) states:

If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to an award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a, and amendments thereto, for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to less any amount deducted from additional disability benefits due the employee pursuant to subsection (c) of K.S.A. 44-525,

and amendments thereto, as determined in the full hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith. No reimbursement shall be certified unless the request is made by the employer or employer's insurance carrier within one year of the final award.

K.S.A. 2014 Supp. 44-525(c) states:

In the event the employee has been overpaid temporary total disability benefits as described in subsection (b) of K.S.A. 44-534a, and amendments thereto, and the employee is entitled to additional disability benefits, the administrative law judge shall provide for the application of a credit against such benefits. The credit shall first be applied to the final week of any such additional disability benefit award and then to each preceding week until the credit is exhausted.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.³ Accordingly, the findings and conclusions set forth reflect the majority's decision and the signatures below attest that this decision is that of the majority.

ANALYSIS

In order to obtain penalties under K.S.A. 44-512a, claimant has the burden of proving she served a written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, either personally or by registered mail. Service must be made on both the employer and insurance carrier and the attorney of record for respondent. Claimant must also prove that payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

Claimant filed with the Division copies of a certified letter, dated August 3, 2015, demanding payment of TTD benefits commencing June 10, 2015, and continuing until claimant reaches maximum medical improvement (MMI) or is returned to work. Respondent paid compensation pursuant to claimant's demand for the period from June 11, 2015, through August 5, 2015. TTD benefits were paid through and terminated unilaterally by respondent on August 19, 2015.

It is clear claimant's certified letter demanded payment of TTD benefits from June 10, 2015, through the time claimant reached MMI or was released to return to work.

³ K.S.A. 2014 Supp. 44-555c(j).

Claimant was never found to be at MMI, nor was she released to return to work. Notwithstanding the fact Dr. Wheeler did not believe the work-related accident to be the prevailing factor causing claimant's need for medical treatment, respondent was still under order to pay TTD benefits.

This case is similar to *Davidson v. Sam's Club/Wal-Mart Store, Inc.*⁴ The Board in *Davidson* affirmed the ALJ's assessment of penalties, finding that it does not matter if the respondent thinks it has a legitimate reason to terminate benefits. It is still a violation of the ALJ's Order.⁵ The Board agrees with the SALJ that respondent's remedy would be to file an application to change benefits under K.S.A. 44-534a. If respondent ultimately prevails with the argument TTD benefits should be terminated on August 19, 2015, it has remedies for the overpayment under K.S.A. 44-534a(b) or K.S.A. 44-525(c).

CONCLUSION

Claimant is entitled to penalties for nonpayment of TTD benefits pursuant to the ALJ's Order dated July 31, 2015.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated October 7, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁴ *Davidson v. Sam's Club/Wal-Mart Store, Inc.*, No. 1,010,483, 2004 WL 1301720 (Kan. WCAB May 28, 2004).

⁵ *Id.* at 3.

e: Jan L. Fisher, Attorney for Claimant
janfisher@mcwala.com

Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
dch@wsabe.com
hhill@wallacesaunders.com

Jerry Shelor, Special Administrative Law Judge

Steven M. Roth, Administrative Law Judge